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In the Supreme Court of the United States

OCTOBER TERM, 1997

NATIONAL ENDOWMENT FOR THE ARTS, ET AL.,
PETITIONERS

v.

KAREN FINLEY, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

SETH P. WAXMAN
Solicitor General
FRANK W. HUNGER
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
STEPHEN W. PRESTON
Deputy Assistant Attorney General
JEFFREY P. MINEAR
Assistant to the Solicitor General
WILLIAM KANTER
ALFRED MOLLIN
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

KAREN CHRISTENSEN
General Counsel
HOPE O'KEEFFE
Deputy General Counsel
National Endowment for the Arts
Washington, D.C. 20506

60 pp

QUESTION PRESENTED

The National Foundation on the Arts and the Humanities Act authorizes the National Endowment for the Arts (NEA) to make monetary grants-in-aid that enable qualifying groups and individuals to undertake a variety of projects related to the arts. The Act provides that, when issuing regulations and establishing procedures governing the grant application process the Chairperson of the NEA shall ensure that

> artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public.

20 U.S.C. 954(d)(1).

The question presented in this case is whether the statutory direction that the Chairperson shall "tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public" is unconstitutional on its face under the First Amendment and the Due Process Clause of the Fifth Amendment.

PARTIES TO THE PROCEEDING

Petitioners are the National Endowment for the Arts and Kathryn Higgins, in her official capacity as Acting Chairperson of the National Endowment for the Arts. Respondents are Karen Finley, John Fleck, Holly Hughes, Tim Miller, and the National Association of Artists' Organizations.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-47a) is reported at 100 F.3d 671. The memorandum opinion of the district court (Pet. App. 48a-89a) is reported at 795 F. Supp. 1457. The order of the court of appeals denying the petition for rehearing (Pet. App. 90a-95a) is reported at 112 F.3d 1015.

JURISDICTION

The judgment of the court of appeals was entered on November 5, 1996. A petition for rehearing was denied on May 1, 1997. On July 23, 1997, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including August 29, 1997. The petition for a writ of certiorari was filed on August 29, 1997, and was granted on November 26, 1997 (J.A. 87). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment and the Due Process Clause of the Fifth Amendment to the United States Constitution, and relevant provisions of the National Foundation on the Arts and Humanities Act, 20 U.S.C. 951 *et seq.*, are reproduced at App., *infra*, 1a.

STATEMENT

A. Federal Funding of the Arts

1. Congress created the National Foundation on the Arts and the Humanities to "develop and promote a broadly conceived national policy of support for the humanities and the arts in the United States." National Foundation on the Arts and the Humanities Act of 1965 (NFAH Act), Pub. L. No. 89-209, § 4(b), 79 Stat. 846, as amended, 20 U.S.C. 953(b). Congress organized the NEA as a part of the Foundation and directed the NEA to "establish and carry out a program of * * * grants-in-aid" to qualifying applicants. *Id.* § 5(a) and (c), 20 U.S.C. 954(a) and (c). Those grants-in-aid, which are distributed on a limited basis under selective criteria, are intended to support "groups or, in appropriate cases, individuals of exceptional talent engaged in or concerned with the arts," in enumerated categories of artistic productions, projects, and workshops. See *id.* § 5(c), 20 U.S.C. 954(c).

The NFAH Act originally identified five such categories. See § 5(c), 79 Stat. 846-847. Since 1965, Congress has modified and enlarged the categories to include the following:

> (1) projects and productions which have substantial national or international artistic and cultural significance, giving emphasis to American creativity and cultural diversity and to the maintenance and encouragement of professional excellence;

> (2) projects and productions, meeting professional standards or standards of authenticity or tradition, irrespective of origin, which are of significant merit and which, without such assistance, would otherwise be unavailable to our citizens for geographic or economic reasons;
>
> (3) projects and productions that will encourage and assist artists and enable them to achieve wider distribution of their works, to work in residence at an educational or cultural institution, or to achieve standards of professional excellence;
>
> (4) projects and productions which have substantial artistic and cultural significance and that reach, or reflect the culture of, a minority, inner city, rural, or tribal community;
>
> (5) projects and productions that will encourage public knowledge, education, understanding, and appreciation of the arts;
>
> (6) workshops that will encourage and develop the appreciation and enjoyment of the arts by our citizens;
>
> (7) programs for the arts at the local level;
>
> (8) projects that enhance managerial and organizational skills and capabilities;
>
> (9) projects, productions, and workshops of the kinds described in paragraphs (1) through (8) through film, radio, video, and similar media, for the purpose of broadening public access to the arts; and
>
> (10) other relevant projects, including surveys, research, planning, and publications relating to the purposes of this subsection.

See NFAH Act § 5(c)(1)-(10), 20 U.S.C. 954(c)(1)-(10); see also *id.* § 5a, 20 U.S.C. 954a (providing for projects relating to arts education). The Act defines many of the relevant statutory terms, including "the arts," "production," "project," and "workshop." *Id.*, § 3(b), (c), (d), and (f), 20 U.S.C. 952(b), (c), (d), and (f).

Congress necessarily vested the NEA with considerable discretion in the administration of the grants-in-aid program, which depends on a case-by-case evaluation of applications, is subject to available appropriations, and can provide funding to only a small fraction of the applicants who seek public support. Congress has authorized the Chairperson of the NEA "to prescribe such regulations as the Chairperson deems necessary governing the manner in which the Chairperson's functions shall be carried out." NFAH Act § 10(a)(1), 20 U.S.C. 959(a)(1). The Chairperson has codified regulations governing certain agency operations, see 45 C.F.R. Pt. 1150, but sets forth most of the guidance on the grants-in-aid application and selection process through more informal means, such as application guidelines, which are provided on request to grant applicants.[1]

2. Since 1965, Congress has occasionally amended the NFAH Act to provide, among other things, legislative guidance with respect to the administration of the grants-in-aid program. The 1990 Amendments, which made a number of revisions to the Act, are of particular interest in this case. See Arts, Humanities, and Museums Amendments of 1990 (1990 Amendments), Pub. L. No. 101-512, 104 Stat. 1960.

a. Before 1990, the Chairperson made the ultimate decisions on grant applications, see NFAH Act § 5(c), 20

[1] Copies of the NEA's application guidelines for fiscal year 1999 (NEA FY 1999 Application Guidelines) have been lodged with the Clerk of the Court.

U.S.C. 954(c) (1988), after receiving the recommendations of a 26-member National Council on the Arts (Council), see *id.* § 6, 20 U.S.C. 955 (1988), and with the optional utilization of experts, including peer review panels, see *id.* § 10(a)(4), 20 U.S.C. 959(a)(4) (1988).

The 1990 Amendments modified the provisions governing the use of experts and consultants by generally requiring the Chairperson to "utilize advisory panels to review applications, and to make recommendations to the National Council on the Arts." NFAH Act § 10(c), 20 U.S.C. 959(c). The 1990 Amendments also directed the Chairperson to issue regulations and establish procedures to ensure that those panels reflect "diverse artistic and cultural points of view" and include "representation of lay individuals who are knowledgeable about the arts." *Id.* § 10(c)(1) and (2), 20 U.S.C. 959(c)(1) and (2). The 1990 Amendments also modified the procedures for formal approval of grant applications, specifying that although the Chairperson retains the final authority to approve a grant application, she may not approve an application with respect to which the Council has made a negative recommendation. *Id.* § 6(f), 20 U.S.C. 955(f).

b. Until 1990, Section 5(d) of the NFAH Act simply provided as follows:

> No payment may be made to any group under this section except upon application therefor which is submitted to the National Endowment for the Arts in accordance with regulations and procedures established by the Chairperson.

20 U.S.C. 954(d) (1988).

The 1990 Amendments modified Section 5(d) to state in relevant part as follows:

> No payment shall be made under this section except upon application therefor which is submitted to the

National Endowment for the Arts in accordance with regulations issued and procedures established by the Chairperson. In establishing such regulations and procedures, the Chairperson shall ensure that—

> (1) artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public; and
>
> (2) applications are consistent with the purposes of this section. Such regulations and procedures shall clearly indicate that obscenity is without artistic merit, is not protected speech, and shall not be funded. * * *

20 U.S.C. 954(d).

The 1990 Amendments were prompted in part by public objections to certain controversial artistic projects that had received NEA funding. The objections focused on a career retrospective exhibit of Robert Mapplethorpe's works, which included homoerotic photography, and an exhibit (funded by a sub-grant to a visual arts center) that included Andres Serrano's "Piss Christ," a photograph of a crucifix immersed in the artist's urine. See, *e.g.*, 135 Cong. Rec. 9788-9789, 10,323-10,325, 14,431-14,433 (1989).

In response to that controversy, Congress in 1989 established an Independent Commission to review the NEA's grant-making procedures, including its panel system, and to consider whether the standards for public funding of the arts should be different from the standards for private funding of the arts. See Department of the Interior and Related Agencies Appropriations Act, 1989, Pub. L. No. 101-121, § 304(c)(1), 103 Stat. 742. The Commission recommended against amending the Act to impose specific restrictions on the content of works of art supported by the

NEA. See Independent Commission, *A Report to Congress on the National Endowment for the Arts* 89-91 (Sept. 1990). Instead, the Commission recommended that Congress: (1) reform the NEA grant-making structure and process, including the composition, role, and operation of the Council and advisory panels (see *id.* at 61-77); and (2) reaffirm, in the statutory declaration of purposes, that the NEA "serves all of the people rather than artists and art institutions alone, that it must be aware of the nature of public sponsorship and that it reflects the high place the nation accords to the fostering of mutual respect for the disparate beliefs and values among us" (*id.* at 91; see *id.* at 59-61).

Congress's amendment of Section 5(d) of the NFAH Act, which followed the receipt of the Independent Commission's report, reflected a compromise among various perspectives on whether and how to impose greater control over the grants-in-aid award process. See, *e.g.*, 136 Cong. Rec. 28,620-28,677 (1990) (House debates on proposed amendments); *id.* at 29,233-29,244 (same); *id.* at 33,443-33,478 (Senate debates on proposed amendments). One proposal, offered by Representative Crane, would have virtually eliminated individual funding decisions by the NEA. *Id.* at 28,645-28,648. That proposal was rejected by the House of Representatives by a vote of 361 to 64. *Id.* at 28,656-28,657. Another proposal, offered by Representative Rohrabacher, would have placed explicit prohibitions on the funding of certain activities. It would have provided, in pertinent part, that none of the funds available to carry out the Act could be used "to promote, distribute, disseminate, or produce matter that has the purpose or effect of denigrating the beliefs, tenets, or objects of a particular religion," or "of denigrating an individual, or group of individuals, on the basis of race, sex, handicap, or national origin." *Id.* at 28,657. That proposal, too, was rejected by

the House of Representatives, by a vote of 249-175. See *id.* at 28,663-28,664.

The compromise amendment of Section 5(d)(1), quoted above, was accompanied by the inclusion of a provision barring the funding of works that had been judicially determined to be obscene. NFAH Act §§ 3(j), 5(d)(2) and 5(*l*), 20 U.S.C. 952(j), 954(d)(2) and (*l*).[2] In accordance with the Independent Commission's recommendations (see pp. 6-7, *supra*), Congress also amended the Act's declaration of findings and purpose to provide, *inter alia*, that "[t]he arts and the humanities belong to all the people of the United States" and "reflect the high place accorded by the American people to the nation's rich cultural heritage and to the fostering of mutual respect for the diverse beliefs and values of all persons," NFAH Act § 2(1) and (6), 20 U.S.C. 951(1) and (6), and that in making funds available for the advancement of the arts:

> Government must be sensitive to the nature of public sponsorship. Public funding of the arts and humanities is subject to the conditions that traditionally govern the use of public money. Such funding should contribute to public support and confidence in the use of taxpayer funds. Public funds provided by the Federal Government must ultimately serve public purposes the Congress defines.

[2] In the 1989 Appropriations Act, Congress had enacted a provision barring the use of appropriated funds for projects that, in the judgment of the NEA, may be considered to be obscene, including "depictions of sadomasochism, homoeroticism, the sexual exploitation of children, or individuals engaged in sex acts and which, when taken as a whole, do not have serious literary, artistic, political, or scientific value." § 304(a), 103 Stat. 741. The Independent Commission recommended that the NEA not be charged with making judgments regarding obscenity and that such determinations be left to the courts. See *Report* at 87-89. The obscenity provisions of the 1990 Amendments implemented that recommendation.

NFAH Act § 2(5), 20 U.S.C. 951(5).

3. In recent years, Congress has restricted the availability of federal funding primarily to qualifying organizations and state arts agencies. See, *e.g.*, Department of the Interior and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-83, § 329, 111 Stat. 1600 (fiscal year 1998 appropriations). The NEA currently provides federal funding through grants-in-aid to organizations that propose specific projects in four categories: Heritage & Preservation; Education & Access; Creation & Presentation; and Planning & Stabilization. See NEA FY 1999 *Grants to Organizations*: Application Guidelines 3, 10-21 (Dec. 1997). The NEA also enters into Partnership Agreements with State Arts Agencies that provide funding to support state arts programs, which foster artistic creation, appreciation, and education, particularly in under-served communities. See *id.* at 23. The NEA distributes funds through Leadership Initiatives that significantly advance the arts, such as projects that tell the American story at the Millennium. See *ibid.* Finally, the NEA provides an extremely limited number of grants-in-aid to individuals through Literature Fellowships and through what are effectively lifetime achievement awards under the American Jazz Masters Program and National Heritage Fellowships in the Folk and Traditional Arts. See *id.* at 24.

B. The Current Litigation

1. The four individual respondents in this case had filed applications for federal grants-in-aid under the NEA's Solo Theater Artists Category at the time that Congress was considering the 1990 Amendments.[3] The NEA denied

[3] As a consequence of congressional action and agency reorganization in 1995, the NEA no longer provides funding for that category. Copies of the NEA's FY 1992 Application Guidelines for that program have been lodged with the Clerk of the Court.

their applications, and they brought suit in district court, alleging, among other things, that the NEA had violated the First Amendment and the NFAH Act by denying their applications on political grounds. After Congress enacted the 1990 Amendments, the artists' association joined the individual respondents in an amended complaint alleging that Section 5(d)(1)—which provides for "taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public"—facially violates the First and Fifth Amendments. See Pet. App. 48a-49a, 52a-56a.

2. The government moved for judgment on the pleadings with respect to the individual respondents' claims relating to the government's denial of their grant applications. The district court denied the government's motion except in one minor respect, Pet. App. 56a-69a, and the government and the individual respondents ultimately settled those claims. At the same time that the government moved for judgment on the pleadings, respondents moved for summary judgment on their facial constitutional challenge to Section 5(d)(1). The district court granted that motion and enjoined the NEA from enforcing the language added by the 1990 Amendments. See *id.* at 69a-89a.[4]

The district court began by rejecting the government's construction of Section 5(d)(1). The government had argued that Section 5(d)(1) did not necessarily require the Chairperson, in evaluating each grant application, expressly to consider whether the proposed project or work of art would reflect "general standards of decency" and "respect for the diverse values and beliefs of the American public." See Pet. App. 74a-75a. The government specifically cited the NEA's determination that it could satisfy Section 5(d)(1) by structuring the grant selection process, including the provision for diverse composition of advisory panels, so that general standards of decency and respect for diverse beliefs and values would be implicitly reflected in the consensus judgments of the decisionmakers. *Id.* at 74a-76a. The court found that interpretation impermissible, ruling that Congress had indicated that "'decency' and 'respect' for diverse beliefs *are* factors to be considered in determining 'artistic merit,'" *id.* at 75a, and that those factors must therefore receive explicit consideration, *id.* at 76a.

[4] The district court rejected the government's argument that respondents lacked standing to bring this suit. Pet. App. 70a-74a. The court stated that two of the individual respondents (Hughes and Miller) satisfied Article III standing requirements because they had received NEA grants at the time of the suit and they claimed that Section 5(d)(1) had restricted their expressive conduct. The court held that the artists' association, which included NEA applicants and grant recipients among its members, also had standing. *Id.* at 72a-74a.

Turning to the constitutional arguments, the district court first ruled that Section 5(d)(1) violates the Due Process Clause of the Fifth Amendment, finding that the requirement that the Chairperson take into account "general standards of decency" is impermissibly vague. Pet. App. 76a-78a. According to the court, "the decency provision fails adequately to notify applicants of what is required of them or to circumscribe NEA discretion." *Id.* at 78a. The court also concluded that Section 5(d)(1) violates the First Amendment. *Id.* at 88a. The court reasoned that "government funding of the arts is subject to the constraints of the First Amendment," *id.* at 87a, that Section 5(d)(1)'s "decency and respect" provision "clearly reaches a substantial amount of protected speech," *id.* at 88a, and that Section 5(d)(1) therefore "violates the First Amendment for overbreadth and cannot be given effect," *ibid.*

3. The government appealed the district court's grant of partial summary judgment on respondents' claims that

Section 5(d)(1), on its face, violates the First Amendment and the Due Process Clause. A divided court of appeals affirmed "essentially for the reasons stated by the district court." Pet. App. 3a. Like the district court, the court of appeals rejected the government's construction of Section 5(d)(1). *Id.* at 7a-16a. The court of appeals concluded that Section 5(d)(1) requires the Chairperson, National Council, and panels to

> examine each grant application to determine if it comports with "general standards of decency" and shows "respect for diverse beliefs and values" as they subjectively understand these terms.

Id. at 17a. Based on that construction, the court ruled that Section 5(d)(1) is unconstitutional. *Id.* at 17a-27a.

The court of appeals concluded that Section 5(d)(1) is void for vagueness under the First Amendment and the Due Process Clause of the Fifth Amendment. Pet. App. 15a-19a. It ruled, primarily on the basis of this Court's decision in *Grayned* v. *City of Rockford*, 408 U.S. 104 (1972), which rejected a vagueness challenge to a noise ordinance, that grant limitations are subject to vagueness principles. Pet. App. 15a. The court of appeals then concluded that the phrase "decency and respect for the diverse beliefs and values of the American public" is "inherently ambiguous" and "impossible to define." *Id.* at 17a-18a. The court stated:

> Since it is not susceptible to objective definition, the "decency and respect" standard gives rise to the danger of arbitrary and discriminatory application. It grants government officials power to deny an application for funding if the application offends the officials' subjective beliefs and values. Inevitably, NEA's decision not to fund a particular artist or project as indecent or disrespectful will depend in part on who is judging the application and whether that official agrees with the artist's point of view.

Id. at 18a-19a (footnote omitted). The court concluded that, "[w]here First Amendment liberties are at stake, such a grant of authority violates fundamental principles of due process." *Id.* at 19a. The court, however, saw no similar problem with applying Section 5(d)(1)'s "artistic excellence" and "artistic merit" criteria, reasoning that the relevant "decision makers possess an expertise in determining 'artistic excellence and artistic merit' that will guide their application of those criteria." *Id.* at 19a n.18.

The court of appeals recognized that its holding that Section 5(d)(1) "is unconstitutionally vague effectively disposes of this case." Pet. App. 20a. The court nevertheless stated that "the First Amendment's prohibition on content- and viewpoint-based restrictions provides an alternate ground for [its] decision." *Ibid.* (footnote omitted). The court of appeals rested its analysis in that respect on the premise that the government may not impose content-based restrictions on protected speech unless the government demonstrates that the restrictions advance a compelling interest and are narrowly tailored to serve that interest. *Ibid.*

The court of appeals stated that the "presence of government funding alters this framework somewhat," because "[t]he government may make content-based choices 'when it is the speaker or when it enlists private entities to convey its own message.'" Pet. App. 21a (quoting *Rosenberger* v. *Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 833 (1995)). The court noted that "when the government appropriates public funds to establish a program it is entitled to define the limits of that program." *Ibid.* (quoting *Rust* v. *Sullivan*, 500 U.S. 173, 194 (1991)). The court nevertheless concluded that "[g]overnment

funding does not invariably justify government control of the content of speech." *Ibid.*

The court of appeals stated that "*Rust* and *Rosenberger* identify two related contexts in which the government may subsidize speech only if it does so in a way that is viewpoint-neutral." Pet. App. 22a. According to that court:

> Neutrality may be required because the area is a "traditional sphere of free expression," *Rust*, 500 U.S. at 200, or because the government has declared its intention to "encourage a diversity of views from private speakers." *Rosenberger*, * * * 115 S. Ct. at 2519.

Ibid. The court of appeals concluded that "[b]oth approaches support the district court's conclusion that government funding of the arts, in the circumstances of this case, must be viewpoint-neutral." *Ibid.*

The court of appeals reasoned that "the arts, no less than the university, are 'at the core of a democratic society's cultural and political vitality'" and that "the NEA's purpose is to support a diverse array of artistic expression." Pet. App. 22a (quoting the district court's decision, *id.* at 81a). The court further concluded that Section 5(d)(1)'s "decency and respect" provision imposes impermissible viewpoint discrimination on grant applicants. *Id.* at 26a. The court of appeals ruled that, "[b]ecause the government has made no attempt to articulate a compelling interest served by the provision, [Section 5(d)(1)] cannot survive strict scrutiny." *Ibid.*

4. Judge Kleinfeld dissented. Pet. App. 27a-47a. He recognized that "[a]rtists, and for that matter, non-artists, are constitutionally entitled to express themselves indecently and disrespectfully toward the beliefs and values of as much of the American public as they like." *Id.* at 28a. He concluded, however, that while the First Amendment

prohibits censorship of indecent expression, it does not require the government to fund such speech. *Id.* at 29a.

Judge Kleinfeld stated that, when the government administers a grant program for the arts, its power to "consider content and viewpoint depends on whether the money it gives out is generally available to all who meet some basic standard, or whether it is a prize given to a select few." Pet. App. 29a. In his view, when the government awards artistic grants on a selective basis, it must inevitably draw distinctions among the applicants based on the government's objectives in providing the financial subsidy. See *id.* at 29a-35a. Hence, it may properly discriminate "by content and viewpoint." *Id.* at 35a-36a. He accordingly rejected the majority's conclusion that Section 5(d)(1) resulted in impermissible viewpoint regulation.

Judge Kleinfeld also rejected the majority's conclusion that Section 5(d)(1) is void for vagueness. Pet. App. 38a-41a He acknowledged that Section 5(d)(1)'s "decency and respect" provision is imprecise, but he noted that the criteria for awarding prizes for artistic achievement—such as "artistic excellence and artistic merit"—are inevitably imprecise. *Id.* at 38a-40a. He concluded that, in any event, constitutional vagueness principles, which apply to direct regulation of speech, do not apply to grants awarded on selective criteria. *Id.* at 40a-41a. "An artist applying for an NEA grant has no formula, and is not entitled to one, for the painting or performance which will produce a grant." *Id.* at 41a.

Furthermore, Judge Kleinfeld stated that "the majority has found prohibitions in the statute which are not there." Pet. App. 41a. He noted that Section 5(d)(1), which reflects Congress's desire to exercise greater control over the NEA's expenditures of taxpayer money, does not prohibit the NEA from providing grants to support indecent or offensive art. Instead, Section 5(d)(1) merely requires that

the NEA ensure that "general standards of decency and respect for the diverse beliefs and values of the American public" are "tak[en] into consideration" as relevant factors in the grant selection process. *Id.* at 41a-43a.

5. The government filed a petition for rehearing and a suggestion of rehearing en banc. The court of appeals denied the petition and suggestion. Pet. App. 90a-91a. Judge O'Scannlain dissented in an opinion in which Judges Kozinski and Kleinfeld joined. *Id.* at 92a-95a. The dissenting judges concluded that the panel's decision gives the NEA statute "an implausible construction," *id.* at 92a, applies "the 'void for vagueness' doctrine where it does not belong," *id.* at 93a, and extends "standard First Amendment principles to a situation that the First Amendment doesn't cover," *id.* at 95a.

SUMMARY OF ARGUMENT

Congress has determined that the NEA should provide federal financial support for the arts through a program that provides limited grants, on a highly selective basis, to specific categories of art projects. Congress's decision to fund art proposals selectively has necessarily required the creation of a process for distinguishing among grant proposals based on "artistic excellence and artistic merit" —criteria that necessarily take into account the content of the proposal and require a substantial element of subjective judgment. The congressional directions set out in Section 5(d)(1) of the NFAH Act, which clarify and enlarge the criteria that inform the selection process, do not violate the First or Fifth Amendments. Most significantly, they take into account valid considerations relating to the expenditure of federal funds, and they do not discriminate invidiously in subsidies in such a way as to suppress expression. The court of appeals was accordingly mistaken in declaring that Section 5(d)(1) is invalid on its face.

A. The court of appeals erred at the outset in interpreting Section 5(d)(1) of the NFAH Act to impose a categorical requirement that grant applications must comport with "general standards of decency and respect for the diverse beliefs and values of the American public." The plain text of Section 5(d)(1) merely indicates that the NEA must ensure that those factors are "tak[en] into consideration" in the course of the NEA's application review process. 20 U.S.C. 954(d)(1). The NEA properly concluded that it could implement Section 5(d)(1)'s direction by increasing the diversity of the NEA's advisory review panels. The NEA's proposed method of implementation is not only consistent with the text and legislative history of Section 5(d)(1) and entitled to deference, but it also avoids any substantial First Amendment issue.

B. Even if this Court concludes that the NEA must specifically advert to the factors set out in Section 5(d)(1) when reviewing each grant application, there is no basis for holding that Section 5(d)(1) violates the First Amendment. Artistic expression is entitled to First Amendment protections from censorship or suppression, but that does not mean that the government must indiscriminately fund specific works of art. The government is entitled to consider a wide variety of factors when determining whether tax monies should be spent, and it may properly consider "general standards of decency and respect for the diverse beliefs and values of the American public" when evaluating artistic excellence and artistic merit. For example, the government may, without violating the First Amendment, consider the form, mode, or style of artistic expression and whether an artistic proposal would meet the artistic needs and interests of the communities that would be served. The government can take such factors into consideration in its funding decisions without discriminating invidiously

in such a way as to aim at the suppression of dangerous ideas.

C. The court of appeals also erred in concluding that Section 5(d)(1) is unconstitutionally vague. That court misapplied the controlling constitutional principles, which prohibit the government from imposing vague standards when *regulating* speech. Those principles are inapplicable in the context of a selective government funding program because the government's refusal to subsidize expressive activity does not, in any meaningful sense, penalize that activity. Moreover, even if vagueness principles apply in this context, Section 5(d)(1) is not unconstitutionally vague because the NEA may adopt regulations that would eliminate any imprecision in the statutory standards.

ARGUMENT

SECTION 5(d)(1) OF THE NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES ACT DOES NOT VIOLATE THE FIRST AMENDMENT OR THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

Introduction

Congress enacted the NFAH Act to foster excellence, diversity, and vitality of artistic achievement in the United States and to broaden public access to the arts. In support of that goal, Congress authorized the NEA to provide highly selective financial support for specific categories of arts projects. Congress used the term "art," as it is commonly understood, to embrace a broad and imprecisely defined range of human endeavor involving conscious use of human skill and imagination. In the context of such a program, Congress may legitimately choose to allow the NEA to select artistic projects, including artistic creations, that not only demonstrate technical proficiency, but also that are appropriate to or meet the needs

of targeted populations or have sufficient impact upon or appeal to a national, regional, or local audience.

Congress created the NEA's grant application and review process to provide a mechanism and selection criteria to guide the NEA's determination of which artistic projects, in Congress's view of the public interest, warrant public financial support. The court of appeals ruled that the Constitution bars Congress from directing the NEA to consider "general standards of decency and respect for the diverse beliefs and values of the American public" in the course of evaluating the "artistic excellence and artistic merit" of projects and works of art for which federal funding is sought. That ruling places an extraordinary limitation on government funding that, as a matter of constitutional law, is both unwarranted and unwise.

There is no question that the arts are communicative and are therefore entitled to First Amendment protection. There also is no question that the First Amendment forbids the government from adopting a paternalistic role with respect to private artistic expression by prohibiting controversial art merely because either the government itself or some (or even many) private persons may find it unartistic or offensive. But that does not mean that the government must fund art without any regard to those considerations.

The government has always made funding decisions with respect to art based on traditional conceptions of the public interest, including considerations of artistic excellence and merit, the impact of a particular project on the community it serves, and, in appropriate circumstances, whether a particular work of art has sufficient artistic appeal to warrant public financial support. Indeed, if the government could not employ selection criteria that take account of such considerations, it might have little choice but to fund art based on random selection.

The NEA funding program, like all programs for selective funding of the arts, must by definition take into account the content of artistic proposals. We submit that Congress acted within its powers by directing the NEA to provide funding based on "artistic excellence and artistic merit" and to ensure that "general standards of decency and respect for the diverse beliefs and values of the American public" are taken into consideration in applying those general criteria. As a practical matter, Section 5(d)(1)'s funding restrictions are far more limited than respondents assert. As a constitutional matter, Section 5(d)(1) does not violate the First Amendment or the Due Process Clause of the Fifth Amendment.

A. The Court Of Appeals Misinterpreted Section 5(d)(1) Of The NFAH Act

Respondents base their constitutional challenges to Section 5(d)(1) of the NFAH Act primarily on their view that it imposes, on its face, impermissible content-based and viewpoint-based restrictions on expressive conduct. In assessing respondents' facial constitutional challenge, the courts have an obligation to construe Section 5(d)(1) in a manner that avoids an unnecessary conflict with constitutional principles. See, *e.g.*, *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979). Moreover, respondents' facial challenge must be rejected unless respondents can "establish that no set of circumstances exists under which the Act would be valid." *Rust* v. *Sullivan*, 500 U.S. 173, 183 (1991) (quoting *United States* v. *Salerno*, 481 U.S. 739, 745 (1987)).[5]

[5] This Court has recognized that parties have greater latitude to bring a facial challenge under the First Amendment if the challenged statute is substantially overbroad in the sense that the law "has the potential to chill the expressive activity of others not before the court." *Forsyth County* v. *Nationalist Movement*, 505 U.S. 123, 129 (1992). That prospect for "chilling" expressive conduct, however, is not present here. "A refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity." *Rust*, 500 U.S. at 193.

The court of appeals ignored those principles and, as a result, created an unnecessary conundrum. As we explain below, the court of appeals adopted an extreme construction of Section 5(d)(1) that is not required by the statutory language and that increases rather than decreases the basis for the constitutional objections that respondents raise. By contrast, the NEA has interpreted and implemented Section 5(d)(1) in a sound way that avoids any serious constitutional issue. The NEA's approach reflects a reasonable interpretation of its delegated responsibilities and is therefore entitled to deference. See, *e.g.*, *Rust*, 500 U.S. at 184; *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845 (1984).

1. *Section 5(d)(1) does not impose a categorical requirement that applications comport with "general standards of decency and respect for the diverse beliefs and values of the American public"*

Section 5(d), as enacted in 1965, provided that the NEA could provide grants only upon an application submitted in accordance with NEA regulations and procedures. The 1990 Amendments modified Section 5(d) to provide additionally as follows:

> *In establishing such regulations and procedures, the Chairperson shall ensure that—*
>
> (1) artistic excellence and artistic merit are the criteria by which applications are judged, *taking into consideration* general standards of decency and respect for the diverse beliefs and values of the American public.

20 U.S.C. 954(d) (emphasis added). As the highlighted terms indicate, Congress's amendment of Section 5(d)(1) has a limited scope. It directs the Chairperson, in establishing regulations and procedures for judging NEA grant applications, to ensure that: (a) applications are judged on the criteria of artistic excellence and artistic merit; and (b) "general standards of decency and respect for the diverse beliefs and values of the American public" are "tak[en] into consideration."

Section 5(d)(1) plainly does not say that "the NEA must use 'decency and respect' as the decisive criterion for awarding grants." Pet. App. 92a (O'Scannlain, J., dissenting from the denial of rehearing en banc). Rather, Section 5(d)(1) merely directs the Chairperson to ensure that those factors are taken into account in fashioning the NEA's process for awarding financial aid. The Act, by its terms, gives the Chairperson considerable discretion in determining how to do so.

The court of appeals accordingly erred in holding that the NEA could implement Section 5(d)(1) in only one way —by "examin[ing] each grant application to determine if it comports with 'general standards of decency' and shows 'respect for diverse beliefs and values.'" Pet. App. 17a; see also *id.* at 8a (Section 5(d)(1) requires the Chairperson "to judge applications according to standards of 'decency and respect'"). The NEA is under no obligation to review or reject applications on that basis. The court of appeals' construction of Section 5(d)(1) is not only wrong, but it also distorts the constitutional question before this Court and creates "an imagined conflict with the First Amendment." *Id.* at 92a (O'Scannlain, J., dissenting from the denial of rehearing en banc). See *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994); *Hannegan* v. *Esquire, Inc.*, 327 U.S. 146, 160 (1946) (Frankfurter, J., concurring).

2. The NEA has properly construed Section 5(d)(1) as merely requiring that it take into consideration "general standards of decency and respect for the diverse beliefs and values of the American public" in the course of its application review process

Section 5(d)(1) does not establish a litmus test for NEA funding, and this Court should not analyze respondents' facial constitutional challenge to Section 5(d)(1) as if it did. The precise constitutional question before the Court is whether Congress may direct the NEA to "take into consideration general standards of decency and respect for the diverse beliefs and values of the American public" in establishing regulations and procedures to govern the grant selection process. Section 5(d)(1) "does not speak directly to" how the NEA should take the prescribed factors into account. Compare *Rust*, 500 U.S. at 184. Congress delegated that responsibility to the NEA, which is the federal agency charged with implementing the statute. See, *e.g.*, *Chevron*, 467 U.S. at 842-845. Under established principles of administrative law, the NEA's interpretation and implementation of Section 5(d)(1) "may not be disturbed as an abuse of discretion if it reflects a plausible construction of the plain language of the statute and does not otherwise conflict with Congress's expressed intent." *Rust*, 500 U.S. at 184. Those standards are satisfied here, and the NEA's approach therefore should have been sustained by the courts below.

The NEA adopted a mechanism for implementing Section 5(d)(1) through the grant application review process. The NEA has recognized that its process for reviewing the "artistic excellence and artistic merit" of an application has always rested on a consensus judgment that contains subjective elements and that implicitly embodies the personal experiences, values, and beliefs of those who participate in the reviewing process. The NEA concluded

that carefully selected advisory panels, coupled with a determined effort to ensure that those panels enjoy a diverse composition of artists and non-artists reflecting a wide range of geographic and cultural perspectives, would adequately ensure "consideration of general standards of decency and respect for the diverse beliefs and values of the American public" in the evaluation of "artistic excellence" and "artistic merit." 20 U.S.C. 954(d)(1). See Declaration of NEA Deputy Chairman Randolph McAusland, J.A. 79-80.[6]

The court of appeals erred in rejecting, without analysis, the NEA's judgment about the most appropriate way in which to implement Section 5(d)(1). That court simply relied on its mistaken understanding that Section 5(d)(1) in effect imposes a rigid litmus test. See Pet. App. 11a.

Significantly, the NEA's approach—unlike the court of appeals' view—is consistent with Section 5(d)(1)'s statutory terms. Furthermore, the NEA's conclusion that Section 5(d)(1) does not impose a rigid prohibition of the sort posited by the court of appeals is supported by the fact that Congress *did* impose such a prohibition in narrowly circumscribed circumstances elsewhere in the 1990 Amendments (in barring the use of funds for works that have been determined by a court to be obscene), and by Congress's rejection in 1990, after extensive debate, of the Rohrabacher proposal, which would have imposed express funding prohibitions going well beyond obscenity. See pp. 7-8, *supra*. The NEA's construction is also consistent with the sparse legislative history specifically addressing the "decency" and "diverse beliefs and values" provisions of Section 5(d)(1), which indicates that they were intended

[6] As the McAusland Declaration indicates, the NEA's efforts to ensure panel diversity go beyond what the NFAH Act otherwise requires and represent a determined effort to effectuate Section 5(d)(1)'s mandate. See J.A. 79-83.

to identify non-dispositive considerations and to be implemented through procedural reforms.[7] Respondents have come forward with no evidence that the NEA's chosen mechanism of increasing advisory panel diversity fails to fulfill the statutory objective of assuring that "general standards of decency and respect for the diverse beliefs and values of the American public" are taken into consideration.[8]

Finally, the NEA's approach does not pose any serious First Amendment issue. Respondents have not contended that the NEA's pre-1990 decisionmaking processes were facially invalid. Respondents cannot seriously contend that the NEA's efforts to increase advisory panel diversity beyond what was required in 1990, and thereby further broaden the perspectives that are brought to bear in the grant review process, amounts to a facial violation of the First Amendment.

[7] See 136 Cong. Rec. 28,621 (1990) (Rep. Pashayan) ("The Williams-Coleman substitute makes it clear that public funds for the arts must be granted in such a way as to take into consideration the general standards of decency and respect that the American people hold for the rights of each other, and the beliefs and values of each other."); *id.* at 28,634 (Rep. Gunderson) ("it will solve the problems procedurally, without getting into censorship"); *id.* at 28,637 (Rep. Coleman) (his proposal "tr[ies] to put the pluralism in the very threshold question of the people who will determine what is artistic excellence and what is artistic merit").

[8] Indeed, there is considerable reason to doubt that respondents—who apparently oppose *any* role for those factors in the NEA's grant-making process—should be heard to argue that the NEA should have gone further and provided for those factors to play a decisive role in individual grant decisions.

B. Section 5(d)(1) Does Not, Under Any Reasonable Interpretation, Violate The First Amendment's Limitations On The Power Of Government To Impose Content-Based And Viewpoint-Based Restrictions On Speech

The NEA's construction of Section 5(d)(1) is sound. Furthermore, it eliminates the constitutional confrontation that the court of appeals created by elevating its own rigid interpretation as the only reasonable construction and then striking Section 5(d)(1) down as unconstitutional on its face. But even if this Court were to find the NEA's approach inadequate and conclude that NEA decisionmakers must specifically advert to "general standards of decency" and "respect for the diverse beliefs and values of the American public" when reviewing each grant application, there would be no basis for holding that Section 5(d)(1) is facially unconstitutional under the First Amendment. Section 5(d)(1) cannot reasonably be construed to go further than requiring the NEA to provide in its regulations or procedures for the inclusion of "general standards of decency" and "respect for * * * diverse beliefs and values" as non-dispositive components of the "artistic excellence and artistic merit" calculus. Such a review process would be fully consistent with the First Amendment. Accordingly, if the Court concludes that the NEA's implementation of Section 5(d)(1) by providing for carefully selected and diverse panels is insufficient to satisfy that Section, the Chairperson should be afforded the opportunity in the first instance to consider what additional measures would be appropriate.

1. *The First Amendment does not categorically prohibit the government from taking content and public appreciation into account in deciding which grant applications are sufficiently meritorious to receive public funding*

The First Amendment generally prohibits the government from regulating protected speech based on its substantive content or the message it conveys. See, *e.g.*, *Rosenberger* v. *Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 828 (1995) (citing *Police Dep't of Chicago* v. *Mosley*, 408 U.S. 92, 96 (1972)). That prohibition has particular force if the government attempts to regulate "not subject matter, but particular views taken by speakers on a subject." *Id.* at 829 (citing *R. A. V.* v. *St. Paul*, 505 U.S. 377, 391 (1992)). "The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Ibid.* (citing *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983)).

Those general limitations on the government's power to *regulate* speech do not, however, necessarily constrain *government funding programs* that have the purpose or effect of selectively subsidizing expressive conduct. "There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy." *Rust*, 500 U.S. at 193 (quoting *Maher* v. *Roe*, 432 U.S. 464, 475 (1977)). Thus, the Court ruled in *Rust* that Congress could create a program for providing grants to family planning projects that was limited to projects that advocated pre-conception family planning methods. The Court stated:

> The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, with-

> out at the same time funding an alternative program which seeks to deal with the problem in another way. In doing so, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.

Ibid. The Court's decision reaffirmed the general principle that "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe that right." *Ibid.* (quoting *Regan* v. *Taxation with Representation*, 461 U.S. 540, 549 (1983)); see also, *e.g.*, *Harris* v. *McRae*, 448 U.S. 297, 317 n.19 (1980).

As the Court recognized in *Rust*, 500 U.S. at 199-200, and reiterated in *Rosenberger*, however, government funding programs are not immune from First Amendment scrutiny. The government has largely unfettered discretion to impose content-based or viewpoint-based restrictions when it "appropriates public funds to promote a particular policy of its own" or "disburses public funds to private entities to convey a governmental message." *Rosenberger*, 515 U.S. at 833. The government has less latitude to impose such restrictions, however, if it "expends funds to encourage a diversity of views from private speakers." *Id.* at 834. For example, if the government provides funding to create a public forum to facilitate public debate, it "must respect the lawful boundaries it has itself set." *Id.* at 829. Thus, when a public university provides funding for student publications to promote an open and robust dialogue on matters of public concern, the university cannot deny funding to a student religious organization based solely on the ground that the organization's publication presents "an avowed religious perspective." *Id.* at 832.

The Court's decision in *Rosenberger* conceptualized differences in government funding programs in part by reference to whether the government has subsidized a

"governmental message" or whether it has effectively created a "forum" to encourage a dialogue on matters of public concern. See 515 U.S. at 829-830, 833. Those characterizations are helpful analytical constructs for evaluating First Amendment principles in certain important and recurring contexts, but they should not be applied beyond the limits of their logic or usefulness. Although those constructs describe two significant features of the First Amendment's terrain, they have limited descriptive value when a government funding program subsidizes expressive conduct without necessarily conveying a government message or creating a forum for private expression. As we next explain, Congress's current program for funding artistic expression through the NEA cannot be fairly characterized as falling squarely within either description.

2. ***The NEA's funding program neither subsidizes a government message nor creates a forum for private expression***

a. Congress has selectively funded the arts in a broad variety of contexts without constitutional controversy. For example, Congress, as well as government agencies and officers exercising delegated power, have determined what artistic works should decorate government buildings, adorn public places, and occupy public museums. They have routinely made those decisions, taking into account the content or "message" of the artistic works, usually without encountering First Amendment objections.

In some situations, government funding of the arts can be fairly characterized as subsidizing a government message. For example, government funding of memorials and monuments may be viewed as an expression of a governmental message favoring democracy and patriotism over fascism or communism. Thus, the NEA's conduct of the

design competition for the Vietnam Veterans Memorial was in aid of the eventual expression by the government regarding the appropriate way in which to commemorate and honor those who served in the Vietnam War. In other instances, government funding might be fairly characterized as creating a public forum. For example, government funding for town hall meetings to encourage a public dialogue on the state of the arts would, as a conceptual matter, resemble the creation of a public forum. In a similar vein, the NEA's Open Studio Project funds public access Internet sites, primarily at arts institutions, in every State and territory.

A considerable portion of government funding of the arts, including the NEA's selective funding of artistic creations, cannot reasonably be described, however, as either conveying a governmental message or as creating a forum for the exchange of private views. Those characterizations are often inadequate, in part, because of the nature of artistic expression. A work of art, while clearly protected expression in its own right, cf. *Hurley* v. *Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 569 (1995), frequently is not communicative in the same sense as conventional speech on matters of public concern. An artist's work intentionally may project no conventional linguistic or cognitive message; the intended message may be abstract, emotive, or purposefully obscure or ambiguous; that message may be multifaceted, ironic, or internally inconsistent; it may be inaccessible without an independent understanding of the work's context and origins; and, quite aside from any message intended by the artist, the work may be subject to varying interpretations from the perspective of viewers or listeners.[9] Consequently, a work of art may not express a

[9] To be sure, many art forms—most obviously, literature and theatrical arts—may convey more explicit linguistic or symbolic messages.

single, identifiable message that the government or other "speakers" could, in any conventional sense, endorse or oppose.

The nature of the NEA's grants-in-aid programs further explains why selective funding of artistic creations is not susceptible to analysis in terms of either creating a governmental message or creating a forum. In the first place, the basic statutory criteria of "artistic excellence and artistic merit" call for aesthetic judgments that are often subjective and highly contested. They necessarily call for a governmental assessment of the value of the project or work that would raise more substantial First Amendment concerns in other settings where the government has undertaken to facilitate private expression, such as in a truly public forum, see *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546 (1975), or when providing mailing privileges for periodicals, see *Hannegan* v. *Esquire, Inc.*, *supra*. As the First Circuit explained in a similar case:

> [W]hile it may be feasible to allocate space in an auditorium without consideration of the expressive content of competing applicants' productions, such neutrality in a program for public funding of the arts is inconceivable. The purpose of such a program is to promote "art," the very definition of which requires an exercise of judgment from case to case. Moreover, money is a more flexible instrument than a public building: an applicant may receive varying amounts depending upon his needs and the promise of his work; similarly, the quantity of available funds may vary. Solutions that may work for an auditorium, such as scheduling on a first-come-first-served basis or upon a prescribed

But other artistic works, such as Chopin's piano études, Rembrandt's commissioned portrait works, or Rodin's sculptures of the human hand, contain no such express message.

> showing of likely box-office success (if that is a solution), are simply not available to a program for funding the arts. If such a program is to fulfill its purpose, the exercise of editorial judgment by those administering it is inescapable.

Advocates for the Arts v. *Thomson*, 532 F.2d 792, 796, cert. denied, 429 U.S. 894 (1976).

Moreover, the government may decide to fund a proposed artistic undertaking for a wide variety of reasons—such as the technical proficiency of the artist, the creativity of the work, the anticipated public interest in or appreciation of the work, the work's contemporary relevance, its educational value, its suitability for or appeal to special audiences (such as children or the disabled), its service to a rural or isolated community, or even simply that the work could increase public knowledge of an art form—without adopting or endorsing any intended or perceived message that might be contained in the artist's work. At the same time, government may institute a selection process designed to implement such public policy choices—including reviewing competing proposals under prescribed public interest criteria—without creating a forum.

Nor does a forum result from the fact that government funding supports art that might ultimately be publicly viewed. The term "forum" describes a meeting place or medium for the exchange of multiple (and typically opposing) viewpoints. See *Rosenberger*, 515 U.S. at 830; *Cornelius* v. *NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 800, 815-818 (1985); *Perry Educ. Ass'n*, 460 U.S. at 45. Congress itself does not, in any meaningful sense, create a forum if it chooses, on an ad hoc basis, to fund a single artistic creation, or even several discrete and unrelated works of art. Similarly, Congress does not create a forum by authorizing the NEA to select for funding a limited number of discrete and unrelated artistic

projects, including some artistic creations, through a competitive application process that applies prescribed selection criteria to the application pool.

b. The court of appeals accordingly erred in evaluating the NEA's funding program on the basis of the "governmental message" and "public forum" constructs, which are simply not helpful in this context. See Pet. App. 21a-26a. The court of appeals' reliance on *Rosenberger*'s public forum construct is particularly misplaced. In that case, the Court usefully employed that construct to evaluate the University of Virginia's program for funding the publications of student organizations. The Court concluded that the University had created what was, in essence, a forum for private expression by comprehensively funding a medium for those organizations to express views on matters of public interest through conventional protected speech. Having created that medium, the University could not categorically exclude one particular viewpoint from participation. 515 U.S. at 828-837.[10]

The NEA funding program differs in fundamental ways from the program at issue in *Rosenberger*. The NEA funding program is not designed to create a forum for discussion of matters of public interest. Rather, it is designed to provide a highly selective funding mechanism for artistic projects that are, from Congress's public policy perspective, most deserving of the public's financial

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[10] As the Court explained, the University of Virginia program funded the extracurricular activities of virtually all student organizations that were "related to the educational purpose of the University," *Rosenberger*, 515 U.S. at 824, including 118 of the 135 groups that had applied for money during the 1990-1991 academic year, *id.* at 825. The Christian student organization was denied funding solely because its publication adopted the "prohibited perspective" of expressing a belief in a deity. *Id.* at 827, 831.

support. Congress made that point clear in its declaration of findings and purposes:

> It is necessary and appropriate for the Federal Government to complement, assist, and add to programs for the advancement of the humanities and the arts by local, State, regional, and private agencies and their organizations. In doing so, the Government must be sensitive to the nature of public sponsorship. Public funding of the arts and humanities is subject to the conditions that traditionally govern the use of public money. Such funding should contribute to public support and confidence in the use of taxpayer funds. Public funds provided by the Federal Government must ultimately serve public purposes the Congress defines.

NFAH Act § 2(5), 20 U.S.C. 951(5).

Congress fashioned a highly selective grants-in-aid process, which provides funds to specific categories of artistic projects, in order, *inter alia*, to "fulfill [the Federal Government's] educational mission, achieve an orderly continuation of free society," "provide models of excellence to the American people," "transmit the achievement and values of civilization from the past via the present to the future, and make widely available the greatest achievements of art." NFAH Act § 2(11), 20 U.S.C. 951(11). Congress gave no indication, explicitly or implicitly, that it intended thereby to create a forum for private expression.

Congress has indicated, of course, that the NEA funding program may support diverse types of artistic projects. See NFAH Act § 5(c), 20 U.S.C. 954(c). But Congress's mere intention to support diverse kinds of artistic projects, or even diverse kinds of art, does not establish that Congress intended to create a public forum. The NEA's funding program, which provides grants for discrete projects based upon rigorous selection criteria rooted in artistic excellence and artistic merit, rather than the

furthering of private discourse, lacks the essential characteristic of a forum: "the free exchange of ideas." *Cornelius*, 473 U.S. at 800. To the contrary, Congress's specification of explicit findings and purposes for public arts funding, its strict limitation of funding to projects meeting specific criteria, and the NEA's resulting ability to provide funding to only a small fraction of the applicants demonstrate that Congress did not intend to create a forum.

Furthermore, the award of each grant by the NEA necessarily rests on an individualized determination by the Chairperson, on the basis of a recommendation by the Council (which in turn is informed by the recommendation of an arts panel), that the project reflects "artistic excellence and artistic merit," and does so to such a degree that it warrants approval for public funding over competing applications. Accordingly, even though the funded private expression does not constitute the government's "own speech," *Rosenberger*, 515 U.S. at 834, and does not convey a "governmental message," *id.* at 833; compare *id.* at 833-834 (distinguishing *Rust*), and even though the government itself might not agree with and does not endorse any message that the private expression conveys, the individualized determination by government decisionmakers that the project or work of art is sufficiently meritorious to warrant public funding does give rise to a distinct "communicative element inherent in the very act of funding itself," *Rosenberger*, 515 U.S. at 892-893 n.11 (Souter, J., dissenting)—namely, that, in the government's judgment, the project or work has artistic excellence and merit. This "communicative element" in government funding was not as pronounced in *Rosenberger* because in that case the University's funding of numerous forms of student expression did not single out any particular example of expression as being, in the

university's view, the most "excellent" and "meritorious." In Section 5(d)(1) of the NFAH Act, Congress has adopted a policy of supporting projects and works that the government itself affirmatively determines have artistic excellence and merit. Congress is entitled to considerable latitude in identifying the criteria that may inform the government's own aesthetic judgments under such a program.

Finally, the NEA funding program, unlike the program in *Rosenberger*, does not categorically prohibit funding of any protected speech—it simply requires, at most, that the NEA consider several non-exclusive and non-conclusive factors in determining whether an artistic proposal warrants public financial support. This case thus does not implicate the central problem that was present in *Rosenberger*, where the University simultaneously created a forum "to encourage a diversity of views from private speakers" and at the same time "silence[d] the expression of selected viewpoints" within that forum. 515 U.S. at 834, 835.[11]

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[11] This case therefore does not present the somewhat different constitutional issues that would be presented by a provision, such as the one in effect for fiscal year 1996 (similar to the proposal rejected in 1990, see pages 7-8, *supra*) that flatly prohibited the funding of any material that "denigrates the religious objects or religious beliefs of the adherents of a particular religion." See Department of the Interior and Related Agencies Appropriations Act, 1996, Pub. L. No. 104-134, Tit. II, § 331(c), 110 Stat. 1321-209. The Office of Legal Counsel of the Department of Justice expressed the opinion, which was conveyed to Congress while a similar provision was under consideration in 1995, that such a provision would be infirm under the First Amendment. See Letter of October 5, 1995, from Andrew Fois, Assistant Attorney General for Legislative Affairs, to Representative Sidney Yates. Perhaps because of such concerns, Congress added to the statutory prohibition (which also applied to material that "depicts or describes, in a patently offensive way, sexual or excretory activities or organs") the qualification that it was to "be strictly applied without regard to the content or viewpoint of the material or performance." 110 Stat. 1321-209.

In short, this Court's decision in *Rosenberger* simply does not address the issue presented here. Furthermore, nothing in *Rosenberger* repudiates the general rule, articulated in *Rust* and other cases, that Congress may "selectively fund a program to encourage certain activities it believes to be in the public interest." *Rust*, 500 U.S. at 193. The NEA program should accordingly be evaluated on the basis of the general and overarching principle that Congress may selectively fund activities based on criteria that it rationally concludes, within the confines of the First Amendment, take into account the public interest. As we explain below, even if Congress has required the NEA to make its funding decisions through explicit consideration of the "decency" and "diverse beliefs and values" factors, Section 5(d)(1) is consistent with the First Amendment.

3. *Section 5(d)(1) is consistent with the First Amendment's core function of protecting individual freedom of expression*

The First Amendment prohibits government from "abridging the freedom of speech" to preserve individual liberty and encourage freedom of expression. A government program that provides public funds to facilitate expressive activity therefore will, as a general matter, promote rather than retard First Amendment values. The choice of appropriate criteria for selecting which activities to fund rests primarily with Congress. Respondents themselves, who have received public funds for their artistic activities in the past, have no objection to public funding for the arts so long as its disbursement is based on criteria of artistic excellence and merit from which any consideration of decency or respect for diverse American values and beliefs has somehow been excised. The choices

that Congress expressed in Section 5(d)(1), however, do not infringe any First Amendment right.[12]

The Constitution vests Congress with the power to authorize expenditures for "the general Welfare of the United States," U.S. Const. Art. I, § 8, Cl. 1, and Congress has broad discretion to determine what considerations of public interest should govern the expenditure of public funds. See, *e.g.*, *South Dakota* v. *Dole*, 483 U.S. 203 (1987); *Regan*, 461 U.S. at 549-550. Even if Congress had, in fact, required the NEA specifically to consider "general standards of decency and respect for the diverse beliefs and values of the American public" in its selective evaluation of "artistic excellence" and "artistic merit," such an instruction would have been entirely reasonable and within the confines of the First Amendment. Those criteria do not, on their face, "discriminate invidiously * * * in such a way as to 'ai[m] at the suppression of dangerous ideas,'" *Rosenberger*, 515 U.S. at 834, quoting *Regan*, 461 U.S. at 548 (internal citations omitted), or otherwise threaten First Amendment values.

The NEA funding program, like any program for funding of the arts short of random distribution of funds to every self-described artist, must, by definition, take into

[12] We note that different First Amendment concerns could come into play if government funding manipulates or skews the "marketplace of ideas" in a way that monopolizes the opportunity for free expression or effectively suppresses the communication of disfavored viewpoints. See *Regan*, 461 U.S. at 550. The NEA's funding program is unlikely to have such an effect because it provides only a small fraction of the total available funding for the arts. See, *e.g.*, R. Post, *Subsidized Speech*, 106 Yale L.J. 151, 194 n.208 (1996) (estimating that "NEA support for the arts is about 5% of total donations"); see also D. Shapiro, *Free Speech and Art Subsidies*, 14 Law & Phil. 329, 344 (1995) (in light of the independence and adversarial stance of the modern arts community, "it's hard to see the cultural marketplace for arts meekly following the government's view that certain artistic messages or viewpoints are not worthy of support").

account the content of artistic proposals. Section 5(d)(1) identifies factors that are reasonable in light of Congress's legitimate objective to fund art that reflects the "rich cultural heritage" of the United States, NFAH Act § 2(6), 20 U.S.C. 951(6); its concern that "[s]uch funding should contribute to public support and confidence in the use of taxpayer funds," *id.* § 2(5), 20 U.S.C. 951(5); and the commonsense basis for allowing some measure of public appreciation to play a role in a program for public funding of the arts in a democracy. Those criteria do not, in any meaningful sense, result in viewpoint-based suppression of protected speech.

a. As an initial matter, Section 5(d)(1)'s reference to "general standards of decency" may be properly understood as setting out aesthetic concepts or guideposts that refer to the mode or form of the artistic activity, and not to any substantive viewpoint or message it may embody. That distinction is significant, as recognized by this Court in holding that the First Amendment does not prohibit the government even from directly regulating private speech, in appropriate contexts, based on the form, mode, or style of expression. See, *e.g.*, *Bethel School Dist. No. 403* v. *Fraser*, 478 U.S. 675, 681-686 (1986); *FCC* v. *Pacifica Found.*, 438 U.S. 726, 743 n.18 (1978) (opinion of Stevens, J.).

The Court's decisions in *Bethel* and *Pacifica* demonstrate that point in the specific contexts of public schools and broadcasting. The Court ruled in each of those cases that government could regulate modes or forms of expression that are highly offensive to substantial portions of the public—such as the use of epithets, profanity, and sexual or excretory imagery—without regard to the content of communication. As the Court observed in *Bethel*:

> Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offen-

> sive terms in public discourse. Indeed, the "fundamental values necessary to the maintenance of a democratic political system" disfavor the use of terms of debate highly offensive or highly threatening to others. Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions.

478 U.S. at 683. See *Pacifica*, 438 U.S. at 747 (opinion of Stevens, J.) ("[T]he constitutional protection accorded to a communication containing such patently offensive sexual and excretory language need not be the same in every context."); *id.* at 743 n.18.[13]

Justice Stevens has addressed the precise distinction at issue here. He has pointed out that a communication may be offensive "[i]ndependently of the message the speaker intends to convey." *E.g.*, *Bolger* v. *Youngs Drug Prods. Corp.*, 463 U.S. 60, 83 (1983) (Stevens, J., concurring in the judgment). For example, "the form of his communication may be offensive—perhaps because it is too loud or too ugly in a particular setting." *Ibid.* Government can, in appropriate circumstances, regulate the form or style of a message, apart from its content, because "regulations of form and context may strike a constitutionally appropriate balance between the advocate's right to convey a message and the recipient's interest in the quality of his environment." *Id.* at 84.[14]

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[13] The Court articulated a similar point in *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (1942), where it explained that "certain well-defined and narrowly limited classes of speech," including "lewd," "obscene," and "profane" utterances, "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Id.* at 571-572. Accord *Bethel*, 478 U.S. at 685; *Pacifica*, 438 U.S. at 746 (opinion of Stevens, J.).

[14] In *Bethel*, the Court expressly distinguished vulgarity and viewpoint restrictions. The Court ruled that a school could punish a student for using "vulgar and offensive terms," "lewd, indecent, or offensive speech," "sexually explicit speech," and "vulgar and offensive language" in a speech to his schoolmates, 478 U.S. at 683-684, so long as its decision was "unrelated to any political viewpoint," *id.* at 685. Justice Brennan concurred on the understanding that the penalties were not triggered by "disagree[ment] with the views [the student] sought to express." *Id.* at 689.

In an analogous setting, the Court in *Board of Education* v. *Pico*, 457 U.S. 853 (1982), recognized the same mode/message distinction. The plurality held that, whereas a school library could not remove books from its shelf if motivated by a desire to "suppress[] ideas," such decisions could be based on a determination that the books were "vulgar" or could be motivated by concerns regarding "educational suitability." *Id.* at 871. Concurring, Justice Blackmun emphasized that such decisions could not be motivated by an attempt to suppress ideas or to restrict access to "political ideas or social perspectives," but could be based on the relevance of the books, the quality of the writing, and offensive language. *Id.* at 877-880.

The Court's rulings in *Bethel* and *Pacifica* and Justice Stevens' observations in *Bolger* all deal with government regulation of speech. But they have relevance here as well. If Congress may, in appropriate contexts, directly *regulate* speech based on the mode, form, or style of communication, it surely may authorize the NEA to take into consideration the mode, form, or style of expression in making the necessarily subjective judgment whether a particular proposal has sufficient artistic merit to warrant federal funding.[15]

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[15] The NFAH Act imposes a flat prohibition on the funding of art that has been judicially determined to be obscene. See p. 8, *supra*. The judicial standard for determining obscenity is set out in *Miller* v. *California*, 413 U.S. 15, 24 (1973), which prescribes a three-part inquiry into whether the artistic work appeals to a prurient interest, is patently offensive, and is without serious artistic value. Just as Section 5(d)(1) does not require rejection of a proposal that may be considered "indecent" by some if other factors demonstrate sufficient artistic excellence or merit, so too the First Amendment should not prevent the NEA from concluding in an appropriate circumstance that an artistic proposal that is patently offensive but has some serious artistic value, and therefore does not appear to be obscene under *Miller*, nevertheless

b. Similarly, the NEA can take into consideration "respect for the diverse beliefs and values of the American public" without infringing First Amendment rights. Section 5(d)(1)'s reference to that consideration embodies a sensible—and constitutional—congressional directive that a public funding program designed to support artistic excellence and merit on a nationwide basis should take into account the specific artistic needs, interests, and aspirations of the communities that will be served. As Congress explained in its declaration of findings and purposes:

> The arts and the humanities reflect the high place accorded by the American people to the nation's rich cultural heritage and to the fostering of mutual respect for the diverse beliefs and values of all persons and groups.

NFAH Act § 2(6), 20 U.S.C. 951(6). Read in that context, Section 5(d)(1) can be viewed as a mandate to consider individual proposals in light of a national interest in enlarging the range of subjects that NEA-funded artistic endeavors might embrace and the range of audiences those endeavors might reach.[16]

In this respect, Section 5(d)(1)'s direction to consider "diverse beliefs and values" *expands* the NEA's criteria for "artistic excellence and artistic merit" beyond those

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does not have *sufficient* artistic value in light of its patently offensive mode of expression to warrant federal funding.

[16] See also NFAH Act § 2(9), 20 U.S.C. 951(9) ("Americans should receive in school, background and preparation in the arts and humanities to enable them to recognize and appreciate the aesthetic dimensions of our lives, the diversity of excellence that comprises our cultural heritage, and artistic and scholarly expression."); *id.* § 2(10), 20 U.S.C. 951(10) ("It is vital to a democracy to honor and preserve its multicultural artistic heritage as well as support new ideas, and therefore it is essential to provide financial assistance to its artists and the organizations that support their work.").

that might be utilized if proposals were judged merely in terms of technical proficiency. That direction does not violate the First Amendment. To the contrary, a congressional direction that broadens the basis for funding artistic expression actually facilitates the First Amendment's ultimate goal of encouraging freedom of expression.

So understood, neither Section 5(d)(1)'s "decency" provision nor its "diverse beliefs and values" provision imposes any meaningful viewpoint-based restriction on expressive conduct. For example, the NEA can take into consideration the sexual imagery of visual artwork without regard to whether the artwork has an identifiable message or viewpoint. Similarly, the NEA may consider an artistic proposal in light of a "respect for the diverse beliefs and values of the American public" by evaluating whether the proposal will meet an artistic goal apart from any judgment about any viewpoint the proposal might express. Congress may properly direct that, when the NEA evaluates the "artistic merit" of a proposal to provide arts to the American public, the agency should bear in mind that no art forms have universal appeal, and it should consider whether the proposal for artistic expression will augment and enrich the cultural life of the particular community that will be served.

Moreover, to the extent that Section 5(d)(1)'s reference to "respect" for diverse beliefs and values would, in some circumstances, lead the NEA to take into consideration whether a particular project or work might be regarded as disrespectful of certain beliefs or values held by some members of the public, Congress may properly direct the NEA to take that factor into account as part of the calculus in evaluating whether a proposal would sufficiently satisfy the basic statutory requirements of "artistic excellence and artistic merit." That approach is

consistent with the recommendation of the Independent Commission in 1990, based on the consensus view of six First Amendment scholars,[17] that such "additional criteria for selection, if any, should be incorporated into the selection process (perhaps as part of a definition of 'artistic excellence'), rather than isolated and treated as exogenous considerations." *Report* at 89 (quoting Prof. Michael McConnell).[18] It also is consistent with Congress's judgment that the NEA's selection process should be conducted in a way that is "sensitive to the nature of public sponsorship," contributes "to public support and confidence in the use of taxpayer funds," and fulfills the "public purposes the Congress defines." NFAH Act § 2(5), 20 U.S.C. 951(5). And it is significant that, as pointed out above (see pp. 23-25, 36, *supra*), Congress has not imposed a flat ban on the funding of activities that do not satisfy rigidly prescribed standards of decency or respect for diverse values and beliefs of the American public. It has determined, rather, that such considerations of public impact and appreciation should be

[17] Private practitioners Floyd Abrams and Theodore Olsen; Dean Geoffrey Stone of the University of Chicago Law School; and Professors Michael McConnell, Henry Monaghan, and Kathleen Sullivan. *Report* at 85 n.2.

[18] The *Report* continued (at 89-90), still quoting Prof. McConnell:

> Whenever a process is set up so that controversial judgments are superimposed on a system, those judgments are legally and popularly vulnerable. . . . While a work of meager artistic quality should be disallowed because of inappropriateness for public funding, a work of great importance might warrant funding despite the same qualities of inappropriateness. It is better to treat all these factors as aspects of the ultimate aesthetic judgment [by the NEA] rather than to make the additional factors, whatever they may be, absolute prohibitions.

regarded as relevant to continued support for and success of the NEA's program for the public funding of the arts.[19]

At bottom, Congress has simply recognized that the arts do not exist in a vacuum. A wide variety of subjective factors, including general standards of decency and respect for diverse values and beliefs, necessarily inhere in the evaluation of the "artistic excellence"—and especially the "artistic merit"—of a particular project or work under a program of public funding of the arts. It is neither realistic, nor mandated by the First Amendment, that the NEA ignore such considerations in making artistic judgments. Congress has made a legitimate policy judgment that they warrant at least some (albeit non-dispositive) consideration when allocating public funds. See *Rust*, 500 U.S. at 192-193; *Maher*, 432 U.S. at 474. Such consideration of public impact, appreciation, and diversity is far different from a program that "discriminate[s] invidiously in its subsidies in such a way as to 'ai[m] at the suppression of dangerous ideas,'" *Rosenberger*, 515 U.S. at 834 (quoting *Regan*, 461 U.S. at 548 (internal citations omitted)).

C. Section 5(d)(1) Is Not Unconstitutionally Vague Under The First Amendment Or The Due Process Clause Of The Fifth Amendment

The court of appeals' conclusion that Section 5(d)(1) is unconstitutionally vague is also incorrect. This Court has never held that the "void for vagueness" principles developed in cases involving regulation of speech apply to

[19] See also NEA FY 1999 Application Guidelines, at 20 (discussing consideration of impact of proposals and their appropriateness for targeted audiences); Department of the Interior and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-83, § 346, 111 Stat. 1605 (directing NEA to give priority "to providing services or awarding financial assistance for projects, productions, workshops, or programs that serve underserved populations" and that "will encourage public knowledge, education, understanding, and appreciation of the arts").

cases involving congressional funding limitations, and there is no warrant for doing so. Furthermore, even if those principles applied, Section 5(d)(1) would not be facially unconstitutional, because the NEA may implement the "decency" and "diverse beliefs and values" provisions through regulations and guidance that provide further precision.

1. ***The court of appeals misapplied the controlling constitutional principles, which prohibit vague regulation of expressive conduct***

The court of appeals declared that Section 5(d)(1), on its face, is unconstitutionally vague. The court relied primarily on this Court's decision in *Grayned* v. *City of Rockford*, 408 U.S. 104 (1972), which rejected a civil rights demonstrator's argument that a local noise ordinance was void for vagueness. The Court stated in that case that laws imposing vague proscriptions on expressive conduct may raise constitutional issues because such laws may (1) "trap the innocent by not providing fair warning"; (2) allow "arbitrary and discriminatory enforcement"; and (3) thereby "inhibit the exercise of [First Amendment] freedoms." *Id.* at 108-109. The Court concluded, nevertheless, that the noise ordinance was valid because it gave "fair notice," it contained "no broad invitation to subjective or discriminatory enforcement," and it did not "permit punishment for the expression of an unpopular point of view." *Id.* at 112-113.

The court of appeals erred at the outset in transplanting *Grayned*'s vagueness principles, which govern the regulation of expressive conduct, to the NEA grant context. As the Court explained in *Grayned*, a vague law prohibiting expressive conduct can chill speech by leaving uncertain what is prohibited and by allowing arbitrary and discriminatory enforcement. The concern that a vague law may penalize lawful conduct is not present, however, in the

NEA grant process, because Congress's use of imprecise standards for awarding grants does not penalize speech in any meaningful sense. An imprecise standard under a highly selective funding program presents no significant risk of inhibiting the exercise of First Amendment freedoms. Government funding, unlike government regulation, cannot "trap the innocent" or result in "arbitrary and discriminatory enforcement" (*Grayned*, 408 U.S. at 108). See Pet. App. 92a-93a. (O'Scannlain, J., dissenting from denial of rehearing); *id.* at 36a-40a (Kleinfeld, J. dissenting).[20]

As the Court explained in *Rust*, a "legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right." 500 U.S. at 193 (quoting *Regan*, 461 U.S. at 549). Accordingly, "[a] refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity." *Ibid.* (quoting *Harris*, 448 U.S. at 317 n.19, and *Maher*, 432 U.S. at 475); see also *id.* at 199 n.5. If the government's decision against funding particular speech does not penalize free expression in violation of the First and Fifth Amendments, then imprecision as to what the government will fund likewise should not infringe First and Fifth Amendment rights.[21]

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[20] The vagueness of a statute's directive could, of course, ultimately give rise to a question of whether Congress has improperly delegated its lawmaking powers. See generally, *e.g.*, *Mistretta* v. *United States*, 488 U.S. 361 (1989). Congress, however, has broad authority to issue "broad general directives," *id.* at 372, even when legislating on issues relating to speech. See *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 225-226 (1943) (upholding a delegation to the Federal Communications Commission to regulate broadcast licensing as "public interest, convenience, or necessity" require). Respondents have made no such "non-delegation" claim here.

[21] As we have noted in the context of viewpoint-based challenges, different constitutional concerns might come into play if government funding had the effect of manipulating or skewing the "marketplace of

The notion that courts should apply First Amendment vagueness principles to government funding decisions is not only unprecedented, but it would lead to intractable problems and, ultimately, unintelligible distinctions. For example, respondents contend in this case that Section 5(d)(1)'s "artistic excellence" criterion has "objective content," but Section 5(d)(1)'s "decency and respect" criteria are "inescapably subjective." Br. in Opp. 19-20. That asserted distinction itself, however, merely reflects respondents' own subjective opinion about those criteria. An individual's conception of "artistic excellence and artistic merit" is invariably informed, to a considerable degree, by the individual's personal experiences, values, and beliefs. Congress stated the criteria for awarding NEA grants in terms of general standards and provided for advisory panels precisely because there is no objectively verifiable measure of "artistic excellence and artistic merit."

Congress properly recognized that the NEA must have a necessary measure of discretion in applying the "artistic excellence and artistic merit" criteria. See, *e.g.*, *Mistretta* v. *United States*, 488 U.S. 361, 372 (1989) (Congress may "delegate power under broad general directives."). Despite the imprecision of the terminology, the court of appeals did not conclude that the "artistic excellence and artistic merit" criteria are unconstitutionally vague. See Pet. App. 18a n.18. There is no constitutional impediment to Congress further *clarifying* the selection criteria by stipulating that "general standards of decency and respect for the diverse beliefs and values of the American public" be "tak[en] into consideration" when applying those criteria in the grant award process. See *Rust*, 500 U.S. at 195

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ideas" in a way that actually suppressed speech. See note 12, *supra*. But, as we also noted, the NEA's funding program is unlikely to have such an effect, and that question, in any event, is not before the Court in this facial challenge. *Ibid*.

n.4 ("Congress' power to allocate funds for public purposes includes an ancillary power to ensure that those funds are properly applied to the prescribed use.").[22]

2. *Even if First Amendment vagueness principles applied in the NEA grant award context, the court of appeals erred in holding that Section 5(d)(1) is facially unconstitutional*

Contrary to the court of appeals' reasoning, Section 5(d)(1) is capable of reasonable application in the grant award process. Even if First Amendment vagueness principles applied in that context, they would not require that the legislation set out standards with "mathematical" precision. See *Grayned*, 408 U.S. at 110. The question would simply be whether the legislation is unconstitutionally vague in the "particular context" in which it is used.

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[22] Indeed, it is commonplace for Congress to authorize programs of competitive grants based on imprecise criteria. The application of First Amendment vagueness principles to government funding programs could call into question the constitutionality of an unknowable number of the many federal programs designed to foster research and scholarship in the arts and sciences. See, *e.g.*, 20 U.S.C. 80g(a)(1) (authorizing the Board of Trustees of the Woodrow Wilson International Center for Scholars to "appoint scholars, from the United States and abroad, and, where appropriate, provide stipends, grants, and fellowships to such scholars"); 20 U.S.C. 1134h(a) (authorizing the Secretary of Education to award Jacob K. Javits fellowships "for graduate study in the arts, humanities, and social sciences" to "students of superior ability selected on the basis of demonstrated achievement and exceptional promise"); 22 U.S.C. 2452(a) (authorizing the Director of the U.S. Information Agency to award Fulbright grants "when he considers that it would strengthen international cooperative relations"); 42 U.S.C. 284(b) (authorizing the directors of the national health research institutes to fund biomedical and behavioral research subject to appropriate "technical and scientific peer review"); 42 U.S.C. 7382c (authorizing the Secretary of Energy to establish Albert Einstein Distinguished Educator Fellowships for elementary and secondary school teachers "recognized for excellence in mathematics or science education").

Id. at 112. The NEA's proposed implementation of Section 5(d)(1) presents no vagueness problems beyond those already present by virtue of the need to examine "artistic excellence and artistic merit." The NEA would continue to examine grant applications on a comparative basis through the use of advisory panels, which contain both artists and non-artists. The NEA's reliance on those consensus recommendations substantially eliminates the prospect of arbitrary application.

Moreover, the NFAH Act authorizes the Chairperson "to prescribe such regulations as the Chairperson deems necessary governing the manner in which the Chairperson's functions shall be carried out." NFAH Act § 10(a)(1), 20 U.S.C. 959(a)(1). The Chairperson accordingly has ample authority to adopt regulations to implement the "decency" and "diverse beliefs and values" provisions and thereby eliminate any imprecision that might otherwise be present. Hence, there is no warrant for declaring Section 5(d)(1) facially unconstitutional on vagueness grounds without giving the NEA an opportunity to interpret and apply those terms in a specific factual setting.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
FRANK W. HUNGER
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
STEPHEN W. PRESTON
Deputy Assistant Attorney General
JEFFREY P. MINEAR
Assistant to the Solicitor General
WILLIAM KANTER
ALFRED MOLLIN
Attorneys

KAREN CHRISTENSEN
General Counsel
HOPE O'KEEFFE
Deputy General Counsel
National Endowment for the Arts

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APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment to the United States Constitution provides:

> Congress shall make no law * * * abridging the freedom of speech.

2. The Fifth Amendment to the United States Constitution states in relevant part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law.

3. Section 5(d) of the National Foundation on the Arts and the Humanities Act of 1965 (NFAH Act), 20 U.S.C. 954(d), states in relevant part:

> No payment shall be made under this section except upon application therefor which is submitted to the National Endowment for the Arts in accordance with regulations issued and procedures established by the Chairperson. In establishing such regulations and procedures, the Chairperson shall ensure that—
>
> (1) artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public; and
>
> (2) applications are consistent with the purposes of this section. Such regulations and procedures shall clearly indicate that obscenity is without artistic merit, is not protected speech, and shall not be funded. * * *

Other relevant provisions of the NFAH Act are reproduced at Pet. App. 96a-105a.